1996

Alayna J. Culbertson, J. Blaine Johnson, Eva C. Johnson, and Diane PEarl Meibos v. Board of County Commissioners of Salt Lake County, Commissioner Randy Horiuchi, and Commissioner Brent Oversen : Brief of Appellee

Utah Court of Appeals

Douglas R. Short; Salt Lake County Attorney; Patrick F. Holden; Deputy County Attorney; Jay D. Gurmankin;Chris R Hogle; Bermn, Gaufin, Tomsic and Savage; Attorney for Commissioners Overson and Horiuchi.
Diane Peral Meibos; Pro Se; Walter F. Bugden; Bugden, Collins and Morton.

IN THE UTAH COURT OF APPEALS

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON and DIANE PEARL MEIBOS,	:	
Plaintiffs/Appellants	:	
v.	:	Case No. 960212CA
THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually,	:	Priority No. 14
Defendants/Appellees.	:	

Appeal from the Order of the Third Judicial District Court
Entered April 14, 1995
The Honorable Glenn K. Iwasaki, Presiding

BRIEF OF APPELLEE BOARD OF COUNTY COMMISSIONERS

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STATEMENT OF JURISDICTION

The Board contests that this Court has jurisdiction because Appellants failed to file a timely notice of appeal. However, if this Court has has jurisdiction over this appeal it is pursuant to Utah Code Ann. § 78-2a-3(2)(j), not Utah Code Ann. § 78-2a-3(2)(i) as stated in Culbertson's statement of jurisdiction.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

A. Did Culbertson's failure to file a notice of appeal within thirty days from the April 14, 1995 final Order preclude this Court from exercising subject matter jurisdiction over this appeal?

Standard of Review: This issue is raised for the first time on appeal because it involves a question solely of the jurisdiction of the Utah Court of Appeals to hear this appeal. The Utah Court of Appeals denied a prior motion for summary disposition on this issue "because one of the issues has been deferred pending plenary consideration of the case . . ." Order, October 17, 1996; Judge Pamela T. Greenwood.

Subject matter jurisdiction is a question of law and a correction of error standard is utilized. Baker v. Angus, 910 P.2d 427, 430 (Utah Ct. App. 1996).

B. Did the trial court err in dismissing all claims

relating to the vacation ordinance based on Culbertson's attorney's in court waiver, abandonment and/or acquiescence of their challenge to the vacation ordinance?

Standard of Review for Summary Judgment: "Because summary judgment is a conclusion of law, we give no deference to the trial court's conclusions of law but review those conclusions for correctness." Dalley v. Utah Valley Regional Med. Center, 791 P.2d 193, 195 (Utah 1990). However, the standard of review for questions of waiver is different. In State v. Pena, 869 P.2d 932, 938 (Utah 1994) the Utah Supreme Court stated that "waiver is a highly fact-dependent question, one that we cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law through a course of such decisions." Further, "[t]he judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceedings as a whole, something an appellate court cannot hope to garner from a cold record." Id. at 936. Therefore, a measure of discretion should be afforded the trial court's order based on waiver.

This issue was presented to the trial court in the Board's answer to the second amended complaint and memorandum in support of its motion for judgment on the pleadings or in the alternative

for summary judgment. (R. 320; 340; 343).

C. Can the trial court's order be sustained under the doctrine of invited error?

Standard of review: Because the doctrine of invited error can only be raised on appeal, there is no applicable standard of review. The Board believes the application of the doctrine in the instant case is a matter of law.

D. Does Culbertson's failure to present arguments attacking the validity of the vacation ordinance to the trial court by motion or otherwise preclude appellate consideration of her arguments?

Standard of review: Because the failure to raise or properly present issues to the trial court will be raised first on appeal, there is no applicable standard of review.

DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

Rule 4 of the Utah Rules of Appellate Procedure.

Rule 52 of the Utah Rules of Civil Procedure.

Copies of the above-cited law are attached as Exhibit A.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the dismissal of certain claims in an amended complaint brought by Appellants Alayna J. Culbertson, J.

Blaine Johnson, Eva C. Johnson and Diane Pearl Meibos (hereinafter individually and collectively referred to as "Culbertson") against the Board of County Commissioners and individually named commissioners arising out of the partial vacation and closure of an adjacent roadway.

B. Course of Proceedings.

On June 20, 1994 Culbertson filed a verified complaint against the Board of County Commissioners seeking to enjoin the vacation of North Union Boulevard. (R. 1-20). Culbertson also filed an Order to Show Cause (R. 29) and a memorandum in support of temporary restraining order. (R. 36-43). The Board opposed the motion through its memorandum (R. 47-76) and the trial court denied Culbertson's motion for a temporary restraining order. (R. 35; 124-126).

On July 14, 1994 Culbertson filed an amended complaint. (R. 89-112). The Board of County Commissioners filed an answer to the amended complaint on July 27, 1994. (R. 113-120). The parties then conducted some discovery out of which arose disputes immaterial to this appeal.

Culbertson next moved for leave to file a second amended complaint on November 23, 1994. (R. 182-183). The Board opposed Culbertson's motion for leave to file an amended

complaint. (R. 194-202). The trial court heard oral arguments on Culbertson's motion on January 30, 1995. (R. 818). At the oral argument then counsel for Culbertson made the following representations to the trial court:

> The reason we are here before you today, your Honor, is not to attack the ordinance. While the original complaint may have those allegations in it, your Honor, it is a mess out there. And what we are here today is asking the county to enforce its own ordinance. If you look at the amended complaint, basically paragraph 33 on, you will see that we are not attacking -- we are not attacking that ordinance in the amended complaint.

(R. 840)

Later at the January 30, 1995 hearing the trial court stated:

> I'm going to allow you to amend if you so choose . . . But it will only be as to injunctive relief -- I guess not injunctive -- I guess it is injunctive relief you're asking me on one hand part of that where a suit to force the county to do something, i.e. to enforce their own ordinances, right?
>
> MR. M. OLSEN: Right.

(R. 842)

At that point, Mr. Nick J. Colessides, the attorney then representing the Board, requested the following clarification from the trial court:

> MR. COLESSIDES: Your Honor, clarification for just one moment.
>
> THE COURT: Yes.
>
> MR. COLESSIDES: Your Honor, as we have viewed these, this is sort -- we are dealing with a moving target. As I see the second amended complaint they are going to be filing another version of it and wherein, as I understand it, they do not seek to invalidate the ordinance, am I correct?
>
> THE COURT: That's what was represented.
>
> MR. COLESSIDES: And that issue is dead.
>
> THE COURT: Plus I have told them they would amend to not include damages and so only as to the injunctive relief as to have the county enforce its own ordinance, that will be the limitation on the amendments.

(R. 843).

The trial court granted Culbertson's motion for leave to file an amended complaint. (R. 294-295). However, the trial court stated from the bench that he would only allow Culbertson to seek injunctive relief and not challenge the vacation ordinance or seek monetary damages against the Board or individually named commissioners. (R. 918-923)

On February 13, 1995 Culbertson filed a second amended complaint which did not comply with the limitations expressly pronounced by the trial court and agreed upon by Culbertson's

counsel. (R. 296-311). On February 22, 1995 the Board of County Commissioners filed an answer to the second amended complaint. (R. 312-323).

The Board moved for judgment on the pleadings, or, in the alternative for summary judgment, on February 27, 1995. (R. 326-328). The Board submitted a memorandum and affidavit in support of its motion. (R. 329-374). On March 1, 1995 Culbertson again moved for injunctive relief pursuant to Rule 65A of the Utah Rules of Civil Procedure. (R. 377-378). Culbertson's motion was supported by a memorandum, exhibits as well as affidavits. (R. 379-437). Culbertson also submitted a memorandum in opposition to the Board's motion for summary judgment. (R. 440-461). The Board submitted its reply memorandum on March 16, 1996. (R. 597). On March 29, 1995 a hearing was held on the Board's motion for summary judgment on Culbertson's motion for an injunction. (R. 637).

The following exchange took place at the March 29, 1995 hearing with Culbertson's counsel present:

> [THE COURT]. . . I'm going to dismiss this matter without prejudice -- without prejudice, that is emphasized -- allowing you to exhaust whatever means you wish to, your administrative remedies, and then have leave, if after that time there has been no resolution to your satisfaction, through the

> -- through Mr. Jones, through the board of planning -- the Planning Commission, through the Board of County Commissioners and the Board of Adjustment, then you do have leave, without prejudice to refile the matter.
> . . .
> It is my indication from listening to you, Mr. Colessides, that you're maintaining that it is a continuing problem and that there will be no waiver of time, and your position taken before me today, and I expect no contrary position be taken in further litigation --
>
> MR. COLESSIDES: That's correct with the exception of the vacation ordinance.
>
> THE COURT: And the vacation ordinance is subject to a previous order that I made.

(R. 921-922)

In a minute entry dated March 29, 1995 the trial court ruled that the complaint was dismissed without prejudice. (R. 637). However, the trial court signed and entered a written final order, consistent with the trial court's statements from the bench, which dismissed with prejudice "plaintiffs' claims as contained within plaintiffs' second amended complaint, relating to that certain Salt Lake County Ordinance as passed by the Board of County Commissioners . . . dated August 10, 1995 . . ."(R. 648).

The Board's attorney, on April 1, 1995, sent Culbertson's attorney the proposed order dismissing claims relating to the

vacation ordinance with prejudice and the remaining claims without prejudice. (R. 644-645). On April 10, 1995 Culbertson filed an objection to an order and requested a hearing on the objection. (R. 639-643). On April 14, 1995 the Board submitted a notice of submission of order. (R. 644-646). On April 14, 1995 the trial court signed and entered the order and no notice of appeal was filed until September 27, 1995. (R. 647-649; 703-708). On April 21, 1995 Culbertson submitted a notice to submit and request for oral argument. (R. 650-651).

On May 18, 1995 the trial court in a minute entry denied Culbertson's objections to the order. (R. 652-653). On August 30, 1995 the trial court in a minute entry directed the Board to draft an order denying the objections. (R. 678). On September 26, 1995 the trial court entered an order denying Culbertson's objections. (R. 701-702). Culbertson filed a notice of appeal on September 27, 1995. (R. 703-708).

On August 13, 1996 the Board filed a motion to dismiss the plaintiff's appeal. The Utah Court of Appeals denied that portion of the motion relating to Culbertson's failure to file a timely notice of appeal noting that "one of the issues has been deferred pending plenary consideration of the case." Order, October 17, 1996 signed by Judge Pamela T. Greenwood.

C. Disposition in the trial court.

Culbertson's second amended complaint was dismissed in part with prejudice and in part without prejudice. Claims relating to the vacation ordinance were dismissed with prejudice, the remaining claims were dismissed without prejudice.

STATEMENT OF FACTS

Because the Board disagrees with a number of Culbertson's statement of facts, the Board states the facts relevant to this appeal as follows:

1. Culbertson and the other parties are owners of real property adjacent to a road named North Union Avenue. (R. 1-2).

2. On February 15, 1994 Hermes Associates, Ltd. ("Hermes") filed a Petition for Street Vacation seeking to vacate North Union Avenue. (R. 489).

3. Hermes filed the petition as owners of land abutting North Union Avenue. (R. 489). Fort Union Associates later became the owner of the land owned by Hermes. (R. 347).

4. Fort Union petitioned to vacate the road in order to facilitate the expansion of a shopping center. (R. 358-359).

5. The Board published the required statutory notices of a hearing to be held on the proposed road vacation. (R. 347; 352-353).

6. On May 25, 1994 the Board held a duly noticed public hearing on the petition to vacate North Union. (R. 347).

7. Culbertson's attorney was present and participated in the public hearing. (R. 348; 359-362).

8. The Board voted 2-1 to vacate a portion of North Union and close a twenty-five foot section of North Union which was directly in front of Culbertson's residence. (R. 347; 362). The road was formerly thirty three feet wide in front of Culbertson's property. (R. 5). The eight feet in front of Fort Union's property was vacated. (R. 157-160). The Board refers the Court to page 70 of the record which, in its view, presents the clearest map and visual illustration of the action taken by the Board. (R. 70).

9. The Board voted to permanently close, but not vacate, a twenty-five foot section of North Union directly abutting the Culbertson property. (R. 362).

10. On July 13, 1994 the Board signed and published the vacation ordinance as Ordinance No. 1270. (R. 481-485).

11. Initially, Hermes planned on giving Culbertson a twenty-five foot easement on the west of Culbertson's property to provide Culbertson access to her property. (R. 111). In a further effort to accommodate the adjacent landowners the Board

decided to make the access to the west of the property a public right-of-way rather than a shared private easement. (R. 159).

12. On August 10, 1994 the Board signed and published a corrected version of the vacation ordinance as Ordinance No. 1275. Ordinance #1275 corrected the legal description contained in the prior ordinance, Ordinance #1270. (R. 354-357).

13. After the trial court dismissed Culbertson's claims in this case, on April 15, 1995 Alayna Culbertson and Diane Pearl Meibos filed another verified complaint against the Board of County Commissioners and Ken Jones, Case No. 950905166 challenging *inter alia* the Board's grant of roadway exemptions for 1070 East and again seeking to litigate the question of "what constitutes reasonable and adequate access to plaintiff's property."

In addition to the Board's statement of facts, many of Culbertson's statement of facts are incorrect or incomplete. The following statements of Culbertson are sufficiently material and incomplete or inaccurate as to warrant a specific response:

1. Culbertson states in paragraph 8 that the vote closing North Union Avenue left no outlet to any other roadway. At all times the Board provided Culbertson with access to her property from what was formerly North Union Avenue. First, Hermes

proposed a shared private easement to the west of Culbertson's property to provide access through North Union Avenue. (R. 20). Then, to further accommodate Culbertson the Board made the roadway a public roadway rather than a shared private easement, which Culbertson concedes is now 1070 East. (R. 159; Culbertson Brief, page 11).

2. Statement of Fact #9 argues that Culbertson did not receive proper notice of the Board's action. The Board has included in the record the notice it gave on the road vacation. (R. 352-353). Culbertson contests whether the notice was proper or adequate, however, that argument is not properly before the Court as is argued by the Board in its brief.

3. Statement of Fact #10 and #13 fails to indicate that the Board accurately represented the status of the Ordinance stating: "The ordinance as proposed when signed and published will vacate a portion of a street located in Salt Lake County known as North Union Avenue . . ." (R. 49). Thus, the Board clearly and unequivocally stated that the ordinance had not yet been signed and published and noted that it "will" vacate North Union Avenue.

4. Statement of Fact #16 is incorrect and contradicts the record. Culbertson states that the Board did not plead waiver: The Board's answer states (R. 118) "Defendants affirmatively

allege that plaintiffs have waived and/or is estopped to maintain their claims as asserted in the complaint." Further, Culbertson omits any reference to the fact that the Board pled the statute of limitations when the limitations period was implicated; in the answer to the second amended complaint. (R. 316)("As a further affirmative defense defendants assert that plaintiffs' attack upon the passage of the vacation ordinance is time barred, more particularly provided for by § 17-27-1001 Utah Code Annotated, 1991 Replacement.")

5. Statement of Fact # 18 states the Board held another hearing was held on the road vacation on August 10, 1994. No citation to the record is provided. The hearing on the road vacation was held on May 25, 1995. The subsequently enacted ordinances were passed at public meetings.

6. Statement of Fact #19 argues that the 1070 East does not comply with the County's Standards for Roadway Development. This is a legal conclusion which the Board disputes, which is not relevant to this appeal and which is not properly before the Court.

7. Statement of Fact # 20 alleging Hermes built into the public roadway similarly argues points not relevant to this appeal and not properly before the Court.

8. Culbertson omits pertinent facts relating to her motion for leave to file an amended complaint in Statement of Fact #22. Specifically, Culbertson does not mention the explicit limitations the trial court placed on any subsequent complaint. Additionally Culbertson omits any mention that the subsequently submitted complaint did not comply with either her own attorney's representations or the trial court's specific directives. See Board's Brief, Course of Proceedings.

9. Paragraph #30 improperly argues that the trial court did not rule on Culbertson's objections prior to signing the final April 14, 1995 Order. This is a legal conclusion and not a fact.

SUMMARY OF ARGUMENT

The Court lacks subject matter jurisdiction to consider Culbertson's appeal because Culbertson did not file a notice of appeal within thirty days after entry of final judgment. The objections Culbertson submitted prior to entry of judgment were not post-judgment motions and did not toll the thirty day time limit for filing a notice of appeal.

The trial court's Order dismissing all claims relating to the road vacation ordinance was properly based on the open court waiver, abandonment and/or acquiescence of such claims by Culbertson's attorney. Culbertson claims the Board did not raise

the affirmative defenses of waiver and statute of limitations. However, the record clearly shows that these defenses were in fact raised in a timely fashion.

In the alternative, the order can be sustained under the doctrine of invited error. Finally, Culbertson's renewed attacks on the vacation ordinance on appeal are improper. Culbertson's arguments are either raised for the first time on appeal, or were never presented to the trial court by motion for decision. Accordingly Culbertson's attacks on the vacation ordinance are not properly before the Court.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE CULBERTSON DID NOT FILE A TIMELY NOTICE OF APPEAL.

The issue before the Court is whether Culbertson's objections submitted prior to the entry of judgment tolled the thirty day time limit for filing a notice of appeal. Culbertson argues that her objections were, in reality, a Rule 52 motion under the Utah Rules of Civil Procedure. The record establishes that Culbertson submitted an objection, not a post-judgment motion, and that therefore she failed to file her notice of claim in a timely manner.

Utah appellate courts have consistently noted that "we cannot take jurisdiction over an untimely appeal." Nielson v. Gurley, 888 P.2d 130, 132 (Utah Ct. App. 1994). Further, "[w]hen a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1990).

Rule 4(a) of the Utah Rules of Appellate Procedure provides that "the notice of appeal . . . shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Rule 4(b) of the Utah Rules of Appellate Procedure recognizes that a judgment or order is not final for purposes of appeal if a proper post-judgment motion is filed under the Utah Rules of Civil Procedure.

Rule 4(b) provides in relevant part that:

> If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

The record shows that Culbertson did not file a notice of

appeal within thirty days of entry of the trial court's final Order. Nor did Culbertson submit a proper post-judgment motion under Rule 4(b) which would effectively toll the time period in which to file a notice of appeal.

The trial court entered the Order on April 14, 1995. (R. 647-649). Culbertson filed a notice of appeal on September 27, 1995, which purported to appeal from the April 14, 1995 Order. (R. 706-708). On April 10, 1995, four days before entry of judgment, Culbertson submitted an "Objection to Order." (R. 639-641). On April 14, 1995 the Board submitted a "Notice of Submission of Order" which stated in part: "In a letter dated April 4, 1995, plaintiffs' counsel advised the undersigned that he was unwilling to approve the order as submitted on the basis that the 'Court did not dismiss Plaintiffs' claims with prejudice'." (R. 644-646). Based on the record before it on April 14, 1995, the trial court signed and entered the Order. (R. 647-649).

The April 14, 1995 Order was a final order under Rule 4 of the Utah Rules of Appellate Procedure. Culbertson should have filed a notice of appeal within thirty days of the Order, but failed to do so. Having failed to file a timely notice of appeal, this Court is without jurisdiction to consider the

appeal.

Culbertson has argued that the objection submitted prior to the entry of the April 14, 1995 order constitutes a Rule 52(b) motion tolling the thirty day time limit. Culbertson relies on Zions First Nat. Bank v. C'est Bon Venture, 613 P.2d 515 (Utah 1980) in support of her position. Dictum in Zions states that:

> If a Rule 52(b) motion is made before judgment and presents a substantial question, and the motion is not disposed of, either expressly or by necessary implication, the running of the time for taking an appeal is suspended under Rule 73(a) until the court disposes of the motion.

Zions, 613 P.2d at 517.

Culbertson's reliance on Zions is misplaced. First, the Court in Zions found that the disputed judgment was final. The Court overturned the trial court's granting of an untimely Rule 52 motion in part because "the judgment . . . [had] the effect of denying the oral motion." Id. at 517. Similarly in the instant case, the trial court's ruling after the submission of Culbertson's objections effectively denied the objections.

Second, in the instant case, the objection was disposed of, either expressly or by necessary implication. Culbertson's objection was submitted four days prior to the entry of judgment. The Board's own notice of submission of the order alerted the

trial court to the exact nature of Culbertson's objection. The trial court signed and entered the order in light of Culbertson's objection and the Board's explanation as to why Culbertson refused to approve the order as to form.

Third, Culbertson's "objection" cannot constitute a Rule 52(b) motion under Neerings v. Utah State Bar, 817 P.2d 320 (Utah 1991). In Neerings, the Utah Supreme Court noted that the purpose of Rule 52(b) motions are "to permit the filing of motions for amendment or making additional findings of fact, which, pursuant to Rule 52(a), are not required in ruling upon motions for summary judgment." Id. at 322. Because no additional findings of fact can be required in a trial court's grant of summary judgment, Culbertson cannot claim her objection was a Rule 52(b) motion. Therefore, Zions is inapplicable because Culbertson's objection cannot, under Neerings, be construed as Rule 52(b) motion. Under DeBry, Culbertson cannot claim her objection was a post-judgment motion, having been submitted prior to the entry of judgment.

This Court refused to find that objections submitted prior to the entry of judgment suspended the finality of the judgment in Morgan v. Morgan, 875 P.2d 563 (Utah Ct. App. 1994) *cert. denied* 875 P.2d 563 (Utah 1994). The Court stated in part that:

> defendant argues that the summary judgment was not a final order because her objections thereto were not expressly ruled upon. Defendant submitted timely objections to plaintiff's proposed order under Rule 4-504(2) of the Code of Judicial Administration, which provides that such objections be submitted within five days after service of the proposed order. After the five-day period had expired, the trial court signed plaintiff's proposed order without expressly ruling on defendant's objections. The objections were before the trial court; therefore, we believe the court implicitly denied plaintiff's objections. In any event, "the time for filing [a] notice of appeal begins to run when the judgment is entered . . ."

Id. at 564 n. 1 (citations omitted).

Similarly in this case, Culbertson submitted timely objections which were either implicitly or explicitly denied by the trial court. Despite Culbertson's written objections that claims relating to the vacation ordinance were not properly dismissed with prejudice, the trial court proceeded to dismiss the claims with prejudice based, in part, on the representations of Culbertson's attorney. The trial court's order resolved the objections and the order was final.

The subsequent actions of the trial court considering the objection did not have the effect of suspending the finality of the judgment. The trial court, on May 18, 1995, issued a minute

entry denying Culbertson's objection and reaffirmed the trial court's intent that claims relating to the vacation ordinance were dismissed with prejudice. (R. 652). On August 28, 1995 the trial court held a hearing on Culbertson's objection[1]. (R. 854-858). At the hearing, the trial court directed the Board's attorney to prepare an Order denying the objections but stated: "Any the issue, as to timeliness, they can take that up with the appellate courts." (R. 857). Therefore, the trial court went out of his way to indicate that he was not ruling on the timeliness of the notice of appeal or whether a notice should have been filed after the April 14, 1995 Order.

On September 26, 1995 the trial court entered a written order denying Culbertson's objections to the April 14, 1995 Order. (R. 701-702). The next day Culbertson filed a notice of appeal, nearly five months after entry of the final Order. (R. 706-708).

The Court lacks subject matter jurisdiction over this appeal because Culbertson failed to file a timely notice of appeal. Culbertson's objection was submitted prior to the entry of the

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[1] At that hearing, Ms. Meibos represented herself. Mr. Olsen had withdrawn as counsel for all the parties. Therefore, the other plaintiffs were unrepresented at that hearing.

April 14, 1995 order. The objections were, therefore, not post-judgment motions which tolled the thirty day time limit under Rule 4 of the Utah Rules of Appellate Procedure.

Culbertson's objection is properly characterized as an objection pursuant to Rule 4-504(2) of the Code of Judicial Administration, not as a post-judgment motion pursuant Rule 52(b) of the Utah Rules of Civil Procedure. Case law construing post-judgment "objections" as post-judgment motions are not applicable. For instance, in DeBry v. Fidelity Nat. Title Ins. Co., 828 P.2d 520, 522-523 (Utah Ct. App. 1992) the Court stated that "[r]egardless of how it is captioned, a motion filed within ten days of the entry of judgment that questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion under either Rule 52(b) or Rule 59(e)."

However, this is not a case where a party inadvertently submitted objections after the entry of judgment. Culbertson's after-the-fact characterization of the objections submitted prior to the entry of judgment would convert every objection into a Rule 52(b) motion. This in turn would create uncertainty and confusion surrounding the finality of judgments and orders.

At oral argument, Ms. Meibos, one of the named parties conceded that: "we found out that you had signed the order on

April 14th was the first week of May, we called the court and they said, yes, you had signed the order." (R. 856). In addition, "a party to lawsuit is on constructive notice of the contents of the court record and has a duty to be aware of what the trial court does." Reeves v. Steinfeldt, 915 P.2d 1073, 1077 n. 6 (Utah Ct. App. 1996). Finally, Culbertson was represented by counsel during the entire thirty day period and beyond. Counsel withdrew on July 3, 1995 (R. 654) well after the thirty day time period had passed. Therefore, it cannot be said that Culbertson was confused because she was a lay person untrained in the nuances of post-judgment motion practice[2].

There is no policy or legal rationale for treating objections submitted prior to the entry of judgment the same as post-judgment motions. Motions and objections serve separate and distinct purposes under the Rules of Civil Procedure and Code of Judicial Administration. Objections are submitted prior to the trial court's receipt of the proposed order under Rule 4-504. No provision is made for hearings on objections to proposed orders

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[2] In fact, Ms. Meibos sent a notice of appeal to the Board's attorney on May 14, 1995 (R. 673-675) and apparently decided not to file that particular notice of appeal. (R. 856). No notice of appeal appears in the court record in or around May 14, 1995.

under Rule 4-504. Conversely, specific provisions are set forth under Rule 4-501(3) for hearing motions. While objections inadvertently served after the entry of judgment may be construed as a post-judgment motion[3], there is no reason to construe objections submitted prior to the entry of judgment as a post-judgment motion or a Rule 52(b) motion.

The record shows that (1) the objections were submitted four days before entry of judgment; (2) the objections were submitted as objections, not as a Rule 52 post-judgment motion; and (3) that the plain language of the trial court's order in effect disposed of the objections. All of these factors indicate that the April 14, 1995 Order was a final order. Therefore, Culbertson did not file a timely notice of appeal and this appeal should be dismissed for lack of subject matter jurisdiction.

POINT II

THE TRIAL COURT CORRECTLY DISMISSED CLAIMS RELATING TO THE VACATION ORDINANCE BASED ON THE IN COURT WAIVER, ABANDONMENT AND/OR ACQUIESCENCE OF THE ROAD VACATION CLAIMS BY CULBERTSON'S ATTORNEY.

In its April 14, 1995 Order, the trial court stated:

> plaintiffs' claims as contained within plaintiffs' second amended complaint,

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[3] See DeBry v. Fidelity Nat. Title Ins. Co., 828 P.2d 520, 522-523 (Utah Ct. App. 1992).

> relating to that certain Salt Lake County Ordinance as passed by the Board of Salt Lake County Commissioners, to-wit, ordinance number 1275 (corrected), dated August 10, 1995, in the records of the Salt Lake County Recorder's Office, be and the same are hereby dismissed with prejudice . . .

(R. 648)(emphasis added).

Culbertson's challenge to the trial court's ruling fails to identify the clearest and most obvious basis for the Order; namely, Culbertson's attorney's open court waiver, abandonment and acquiescence. Culbertson's attorney's waiver renders Point III in her brief moot. When faced with the argument at oral argument in the trial court, Culbertson's attorney elected to waive and abandon the claims rather than address the arguments posed by the Board. Having made that election, Culbertson may not now retreat from her position as stated by her attorney.

A client is bound by the statements of her attorney. Utah Code Ann. § 78-51-32(2) (1996) provides that an attorney has authority "to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise." See also John Deere Co. v. H Equipment, Inc., 876 P.2d 880, 886 n. 11 (Utah Ct. App. 1994) and In Re Cargill, Inc., 66 F.3d 1256, 1261 (1st Cir. 1995)("it is common ground that civil litigants are bound by

their attorney's tactical judgments . . . and waivers based on silence are standard fare . . ."). Culbertson is bound by the in court waiver, abandonment and/or acquiescence of her attorney on all claims relating to the vacation ordinance.

Abandonment is defined as "the intentional, unequivocal relinquishment of a benefit due from another." Anderson v. Brinkerhoff, 756 P.2d 95, 98 (Utah Ct. App. 1988). Waiver is defined as "the intentional relinquishment of a known right." Barnes v. Wood, 750 P.2d 1226, 1230 (Utah Ct. App. 1988).

Culbertson's attorney waived all claims relating to the vacation ordinance at the oral argument on the motion for leave to file an amended complaint on January 30, 1995 and thereafter at oral argument on March 29, 1995. (R. 818-845). In the January 30, 1995 hearing, Culbertson's attorney made the following statements in open court:

> The reason we are here before you today, your Honor, is not to attack the ordinance. While the original complaint may have those allegations in it, your Honor, it is a mess out there. And what we are here today is asking the county to enforce its own ordinance. If you look at the amended complaint, basically paragraph 33 on, you will see that we are not attacking -- we are not attacking that ordinance in the amended complaint.

(R. 840)

Later the trial court stated:

> I'm going to allow you to amend if you so choose . . . But it will only be as to injunctive relief -- I guess not injunctive -- I guess it is injunctive relief you're asking me on one hand part of that where a suit to force the county to do something, i.e. to enforce their own ordinances, right?
>
> MR. M. OLSEN: Right.

(R. 842)

At that point, Mr. Nick J. Colessides, the attorney then representing the Board, requested the following clarification from the trial court:

> MR. COLESSIDES: Your Honor, clarification for just one moment.
>
> THE COURT: Yes.
>
> MR. COLESSIDES: Your Honor, as we have viewed these, this is sort -- we are dealing with a moving target. As I see the second amended complaint they are going to be filing another version of it and wherein, as I understand it, they do not seek to invalidate the ordinance, am I correct?
>
> THE COURT: That's what was represented.
>
> MR. COLESSIDES: And that issue is dead.
>
> THE COURT: Plus I have told them they would amend to not include damages and so only as to the injunctive relief as to have the county enforce its own ordinance, that will be the limitation on the amendments.

(R. 843).

Later, at the hearing on the Board's motion for summary judgment on March 29, 1995 (R. 859-924) the trial court ruled as follows:

> . . . I'm going to dismiss this matter without prejudice -- without prejudice, that is emphasized -- allowing you to exhaust whatever means you wish to, your administrative remedies, and then have leave, if after that time there has been no resolution to your satisfaction, through the -- through Mr. Jones, through the board of planning -- the Planning Commission, through the Board of County Commissioners and the Board of Adjustment, then you do have leave, without prejudice to refile the matter.
> . . .
> It is my indication from listening to you, Mr. Colessides, that you're maintaining that it is a continuing problem and that there will be no waiver of time, and your position taken before me today, and I expect no contrary position be taken in further litigation --
>
> MR. COLESSIDES: That's correct with the exception of the vacation ordinance.
>
> THE COURT: And the vacation ordinance is subject to a previous order that I made.

(R. 921-922)

Culbertson's attorney, by his affirmative representations to the trial court, waived and abandoned claims relating to the

vacation ordinance at the hearing on January 30, 1995[4]. Culbertson's attorney affirmatively indicated that the reason he was in court was not to attack the vacation ordinance. (R. 840). Counsel again affirmatively assented to the trial court's description of his suit as only seeking to enforce the ordinance through injunctive relief. (R. 840). Later, when Mr. Colessides sought clarification, Culbertson's attorney was present. Mr. Colessides specifically asked whether they were going to attack the vacation ordinance and the trial court stated "That's what was represented." (R. 843). Mr. Colessides then stated that the issue is dead and the trial court agreed. (R.

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[4] Although Culbertson's attorney submitted, and the trial court signed, an Order On Motion For Leave To Amend Complaint which did not contain the limitations clearly stated by the trial court and accepted by Culbertson (R. 294-295), the Board in its first responsive pleading asserted waiver and/or estoppel as defenses. (R. 320,321). The Board then moved for the dismissal of the road vacation claims improperly submitted based on Culbertson's attorney's waiver of these claims. (R. 343)("in view of the fact that the condition precedent to the filing of the second amended complaint as ordered by the Court, was the waiver by plaintiff of their claims relating to the validity and passage of the Vacation Ordinance . . ."). See also (R. 603)(discussing counsel's statements at January 30, 1995 hearing). The record shows that the trial court had the transcripts of the January 30, 1995 hearing at the time it considered the parties' position on March 29, 1995. (R. 818)(indicating transcript filed on March 27, 1995). Therefore, the Board properly and timely raised the issue of waiver opposing Culbertson's assertion of claims relating to the vacation ordinance.

843). During this entire exchange, Culbertson's attorney by remaining silent acquiesced to the characterization of his claims by both opposing counsel and the trial court.

Culbertson's attorney was also present during the March 29, 1995 hearing and did not object or indicate that the trial court erred in its recollection of the status of the claims relating to the vacation ordinance. The failure of Culbertson's attorney to object or in any way dissent shows that he waived, abandoned and/or acquiesced to the dismissal of claims relating to the road vacation ordinance. Culbertson is bound by the conduct of her attorney. Culbertson's attorney's conduct is similar to the conduct considered in Carrier v. Pro-Tech Restoration, 909 P.2d 271, 275 (Utah Ct. App. 1995) *cert. granted* 920 P.2d 1194(1996) where the Court considered an attorney's waiver of a challenge to a trial court's grant of additional peremptory challenges to a defendant. The Court stated:

> Rightly or wrongly, counsel conceded that Pleasant Grove had different interests than Smith and Pro-Tech and did not continue to press his argument as it pertained to Pleasant Grove. Therefore, because plaintiff ultimately waived her objection to the trial court's decision granting Pleasant Grove an additional set of peremptory challenges, we will not allow her to contest it on appeal.

Id. at 275.

The trial court properly entered an Order dismissing claims relating to the vacation ordinance with prejudice based on Culbertson's attorney's open court waiver, abandonment and acquiescence to the dismissal of such claims.

POINT III

THE BOARD DID PROPERLY AND TIMELY PLEAD BOTH WAIVER AND STATUTE OF LIMITATIONS.

Culbertson's first point that the Board waived, by failing to plead both waiver and statute of limitations, is inconsistent with the record and is without merit. Culbertson contends the Board failed to raise the defense of waiver and statute of limitations. First, the Board affirmatively asserted the defense of waiver and estoppel in its answer to Culbertson's second amended complaint. (R. 320). Therefore, the Board did raise the defense of waiver in a timely fashion and Culbertson's waiver of all claims relating to the vacation ordinance was properly considered by the trial court.

Second, the Board did plead the affirmative defense of statute of limitations in alleging Culbertson's failure to comply with Utah Code Ann. § 17-27-1001 (1995) in its answer to Culbertson's second amended complaint. The Answer specifically stated: "As a further affirmative defense defendants assert that

plaintiffs' attack upon the passage of the vacation ordinance is time barred, as more particularly provided for by § 17-27-1001 Utah Code Annotated, 1991 Replacement." (R. 316). Because Culbertson's first amended complaint was, if anything, premature, the Board's first answer did not raise the statute of limitations. When the untimeliness of Culbertson's attack on the vacation ordinance became an issue, the Board raised the defense in a timely fashion. Even before the filing of the amended complaint, the Board raised the issue of non-compliance with U.C.A. § 17-27-1001 (1995) in writing in its memorandum opposing the proposed amended complaint. (R. 200-201).

In addition, the Board raised Culbertson's waiver of her vacation ordinance claims in its memorandum in support of its motion for judgment on the pleadings or in the alternative for summary judgment. (R. 330; 343). Therefore, this issue was presented to the trial court properly and Culbertson was given the opportunity to respond to the argument that her attorney waived claims relating to the vacation ordinance. In fact Culbertson responded to this argument in her memorandum in opposition. (R. 453-454). Therefore, Culbertson cannot now claim she did not have notice of either the waiver or statute of limitation argument or that she was not provided an opportunity

to respond to the argument. The record shows that both arguments were presented to the trial court in writing and that oral argument was received on both issues. The manner in which both of these issues were considered comported with fundamental notions of due process.

POINT IV

THE TRIAL COURT'S ALLEGED FAILURE TO COMPLY WITH RULE 52 OF THE UTAH RULES OF CIVIL PROCEDURE IS NOT REVERSIBLE ERROR.

Assuming *arguendo* that the trial court's April 15, 1995 Order did not comply with U.R.C.P. 52(a) by failing to issue a statement of grounds for its decision, such failure is not reversible error. See Retherford v. AT & T Communications, 844 P.2d 949, 958 n. 4 (Utah 1992)("failure to issue a statement of grounds is not reversible error absent unusual circumstances . . ."). The alleged failure to comply with Rule 52 is not reversible error in light of the fact that the record provides a clear and legally sufficient basis upon which to base the trial court's ruling, i.e. the waiver, abandonment and/or acquiescence of Culbertson's attorney.

The Utah Court of Appeals has stated that "on review . . . [the appellate courts] are not limited to written findings, and may properly examine findings expressed solely from the bench or

contained in other court documents, such as court memoranda." Merriam v. Merriam, 799 P.2d 1172, 1177 (Utah Ct. App. 1990).

The transcripts of the hearings combined with the memoranda submitted to the trial court provide a clear and proper basis for the dismissal of the claims relating to the road vacation ordinance. Accordingly, the Board requests that the trial court's order be affirmed.

Culbertson argues that this Court may simply strike the vacation ordinance based on arguments not not presented to the trial court for consideration. Culbertson relies on Masters v. Woosley, 777 P.2d 499 (Utah Ct. App. 1989). First, Masters does not stand for the proposition that failure to comply with Rule 52(a) is "normally reversible error." Instead, the court noted that "in an appropriate case, failure to do so may justify remand to the trial court." Id. at 501. In fact, the general rules in Utah is that non compliance with Rule 52(a) is not reversible error. See Retherford v. AT & T Communications, 844 P.2d 949, 958 n. 4 (Utah 1992). Further, the plaintiff in Masters only sought to challenge the trial court's grant of summary judgment, and did not seek to obtain a ruling against the opposing party for the first time on appeal. Culbertson did not move for summary judgment or judgment on the pleadings below. Because Culbertson

did not move for summary judgment on the validity of the vacation ordinance, the trial court did not rule on it. See Ong International v. 11th Avenue Corp., 850 P.2d 447, 455 n. 31 (Utah 1993)("Our concern is whether an argument was addressed in the first instance to the trial court.") Therefore, Culbertson may not now move to invalidate the vacation ordinance on appeal.

POINT V

THE ORDER CAN BE UPHELD UNDER THE DOCTRINE OF INVITED ERROR.

Assuming *arguendo* the Order entered by the trial court was in error, it was invited error on the part of Culbertson and therefore is not properly subject to attack by Culbertson. This Court has stated that "[a] party who leads a court into error cannot later complain of that error to obtain reversal." Merriam v. Merriam, 799 P.2d 1172, 1175-1176 (Utah Ct. App. 1990). See also Butler Crockett v. Pinecrest Pipeline, 909 P.2d 225, 235 (Utah 1995)(applying invited error doctrine based on statement of counsel in open court) and Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 354 (Utah 1943)("A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error. . . .").

The statements and later silence of Culbertson's attorney

led the trial court into entering the ruling that claims relating to the vacation ordinance were dismissed with prejudice. Culbertson's attorney had the opportunity to object to the trial court's interpretation of his statements or to clarify them at either the January 30, 1995 or March 29, 1995 hearing but chose not to do so. Accordingly, Culbertson may not now attack the Order which was entered based on Culbertson's attorney's representations to the trial court.

POINT VI

CULBERTSON'S CHALLENGES TO THE VACATION ORDINANCE ARE NOT PROPERLY BEFORE THE COURT.

Culbertson raises several arguments challenging the validity of the vacation ordinance on appeal. First, such claims have been waived and abandoned by Culbertson in the trial court. Second, affirmative attacks on the vacation ordinance are not properly before this Court.

Culbertson argues that the vacation ordinances (1270 and 1275) are invalid because of the Board's alleged failure to comply with U.C.A. § 17-27-810(1)(a). This argument is raised for the first time on appeal and is therefore not properly before this Court. See State v. Carter, 707 P.2d 656, 660 (Utah 1985)("where a defendant fails to assert a particular ground . .

. in the trial court, an appellate court will not consider that ground on appeal.") and John Deere Co. v. A & H Equipment, Inc., 876 P.2d 880, 888 (Utah Ct. App. 1994). Culbertson did not challenge at the trial court the vacation ordinance based on the Board's alleged non-compliance with section 810(1)(a). Neither did Culbertson submit a cross-motion for summary judgment seeking to declare the ordinance invalid. Therefore, Culbertson may only appeal the trial court's dismissal of her claims with prejudice and may not, in effect, seek summary judgment for the first time on appeal.

In addition, Culbertson failed to comply with Rule 24(a)(5) of the Utah Rules of Appellate Procedure which requires a citation to the record showing that the issue was preserved or in the alternative a statement of the grounds for seeking review if the issue was not properly preserved by the trial court. See Culbertson Brief, pages 1-2.

Culbertson's conduct in representing to the trial court through counsel that the vacation ordinance would not be challenged precluded the Board from presenting arguments in support of the vacation ordinance. See Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 672 (Utah 1982)(despite the fact that issue raised in pleading "[t]his Court will not

consider on appeal issues which were not submitted to the trial court and concerning which the trial court did not have the opportunity to make any finding of fact or law.") Because Culbertson waived and abandoned claims relating to the vacation ordinance, the Board did not persist in presenting arguments to the trial court in support of its validity.

Such arguments would include the fact that the alleged failure to comply with Utah Code Ann. § 17-27-810(1)(a)(1995) does not affect the validity of the Board's actions. Utah appellate courts have consistently held that time limitations on governmental actions are directory and not jurisdictional "if it is 'given with a view merely to the proper orderly and prompt conduct of business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.'" Cache County v. Property Tax Division, 296 Utah Adv. Rep. 33 (Utah 1996)(citing 1A Sutherland, Statutory Construction § 25.03 (4th Ed.)). In Kennecott Copper Corp. v. Salt Lake County, 575 P.2d 705 (Utah 1978) the Utah Supreme Court addressed whether statutory provisions "regarding the time period in which the board of county commissioners must perform its statutory duty in levying a property tax, are directory or mandatory." The court reiterated the general rule as set forth in the early case of

State ex rel. Wright v. Park City School District, 133 P. 128, 129, 43 Utah 61, 66 (1913):

> The general rule is that a statute, prescribing the time within which public officials are required to perform an official act, is directory only, unless it contains negative words denying the exercise of the power after the time specified or the nature of the act to be performed, or the language used by the Legislature shows that the designation of time was intended as a limitation . . . .

Under the above-cited case law, any failure to comply with 17-27-810 (1995) by the Board does not invalidate the ordinance. Case law cited by Culbertson from the area of redevelopment law is inapplicable. The vacation of a public road is not in derogation of an individual's property rights. The strict rule of statutory construction in the area of redevelopment law arises from the use of condemnation procedures against landowners. Here, the Board did not initiate condemnation proceedings against Culbertson.

The trial court also did not address the propriety of the notice provided due to Culbertson's waiver and abandonment of her challenge to the vacation ordinance[5]. However, Culbertson's

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[5] Culbertson did challenge the propriety of the notice in her amended complaint but did not present the argument to the trial court by way of summary judgment motion. Culbertson did

claim that she did not receive adequate notice is not supported by case law or the record. Culbertson relies on Nelson v. Provo City, 872 P.2d 35 (Utah Ct. App. 1994) which is distinguishable. In Nelson, the "City mailed no notice of the vacation to the abutting landowners either before or after the fact." Id. at 36. Not surprisingly, the Court held:

> Here, City did not notify abutting landowners, nor did it notify its citizens generally pursuant to statute. In fact, the single published notice ran after the purported vacation. Thus, City's notice was not only insufficient, it was timely.

Id. at 38.

Conversely, the Board properly sent and published notice of the proposed vacation. (R. 352-353). In fact, Culbertson's attorney was present and participated in the hearing considering the proposed vacation. (R. 359-360). Utah's statutory scheme regarding land use decisions only require notice of the public hearing to consider the proposed vacation. The Board complied with these notice requirements codified in U.C.A. § 17-27-808 & 809 (1995). In addition, the Board complied with the notice

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suggest in her memorandum opposing summary judgment that she did not receive notice of the August 10, 1995 decision. However, she did not move to invalidate the ordinance on that basis. Therefore, the argument is in effect, raised for the first time on appeal.

requirements generally applicable to ordinances. See U.C.A. § 17-15-1 (1995).

The final improper challenge to the vacation ordinance is that the trial court improperly shifted responsibility for complying with the applicable statutory requirements. The trial court did no such thing. The trial court dismissed Culbertson's claims relating to the vacation ordinance based on her attorney's own statements. As for the notice requirements, the Board complied with the notice requirements set forth in U.C.A. § 17-17-808 & 809 (1995) as well as U.C.A. § 17-15-1 (1995).

This appeal is an improper attempt to revisit an issue abandoned long ago. To allow Culbertson to pursue an attack on the road vacation ordinance would unfairly prejudice the Board. The Board had a right to rely on the in court representations of Culbertson's attorney. Culbertson should not now be allowed to back out on statements made in court to both to the Board's attorney and the trial court.

CONCLUSION

The Court lacks subject matter jurisdiction over this appeal. Culbertson failed to file a timely notice of appeal. Further, the objections submitted prior to entry of order do not constitute a proper post-judgment motion which tolls the thirty

day limit on filing notice of appeals. The Board requests that Culbertson's appeal be dismissed for lack of subject matter jurisdiction for failure to file a timely notice of appeal.

The trial court correctly dismissed claims relating to the road vacation ordinance with prejudice based on Culbertson's counsel's in court waiver and abandonment of such claims. In the alternative, the doctrine of invited error applies to sustain the order. Culbertson's attacks on the vacation ordinance are not properly before the Court. Therefore, the Board requests that the trial court's order be affirmed and Culbertson's appeal dismissed.

Finally, the Board joins in and incorporates by reference the arguments made by Commissioners Overson and Horiuchi relating to the vacation ordinance and the trial court's dismissal of claims relating to the ordinance as well as the arguments relating to Culbertson's untimely notice of appeal.

DATED this 14th day of February, 1997.

DOUGLAS R. SHORT
SALT LAKE COUNTY ATTORNEY

Patrick F. Holden
Deputy County Attorney

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of February, 1997 I mailed a true and correct copy of the foregoing BRIEF OF APPELLEE BOARD OF COUNTY COMMISSIONERS postage pre-paid, first class mail, to the following:

Walter F. Bugden
BUGDEN, COLLINS & MORTON
4021 South 700 East, Suite 400
Salt Lake City, Utah 84107

Jay D. Gurmankin
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50 South Main Street, Suite 1250
Salt Lake City, Utah 84144

Diane Pearl Meibos
3278 Marjon Circle
Sandy, Utah 84092-4212

…might appeal as matter of right. Jensen v. …sen, 22 Utah 2d 23, 447 P.2d 906 (1968).
…der denying a motion for summary judg… was not a final order and was not appeal… Denison v. Crown Toyota Motors, Inc., …P.2d 1359 (Utah 1977).
…ummary judgment in favor of one defen… alone is not a final judgment where the …on against the remaining defendant re… alive. Neider v. State DOT, 665 P.2d …06 (Utah 1983).

…nsigned minute entry.

…n unsigned minute entry did not constitute an entry of judgment, nor was it a final judgment for purposes of appeal. Wilson v. Manning, 645 P.2d 655 (Utah 1982); Utah State Tax Comm'n v. Erekson, 714 P.2d 1151 (Utah 1986); Sather v. Gross, 727 P.2d 212 (Utah 1986); Ahlstrom v. Anderson, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal. State v. Crowley, 737 P.2d 198 (Utah 1987).

Cited in Huston v. Lewis, 818 P.2d 531 (Utah 1991); Boggs v. Boggs, 824 P.2d 478 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

…L.R. — Appealability of order suspending …position or execution of sentence, 51 …L.R.4th 939.

…ule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court.

No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

NOTES TO DECISIONS

ANALYSIS

Administrative actions.

Subdivision (c) does not apply to petitions for review of administrative actions. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah Ct. App. 1993).

Attorney fees.

No cross-appeal is necessary where plaintiffs merely sought attorney's fees incurred in defending their judgment on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Cross-appeal.

Subdivision (d) requires that a notice of cross-appeal be timely filed. Absent a cross-appeal, a respondent may not attack the judgment of the court below. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990) (decided under former R. Utah S. Ct. 4).

Extension of time to appeal.

Neither Rule 6(b), U.R.C.P., granting the court power to extend a time limit where a failure to act in time is due to excusable neglect generally, nor Rule 60(b)(1), U.R.C.P., authorizing the court to relieve from final judgment for inadvertence or excusable neglect, applies where a notice of appeal has not been timely filed. Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970).

A party could not extend the time for filing an appeal simply by filing a "Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment." Peay v. Peay, 607 P.2d 841 (Utah 1980).

When the question of "excusable neglect" arises in a jurisdictional context, as opposed to a nonjurisdictional context, the standard contemplated thereby is a strict one; it is not meant to cover the usual excuse that the lawyer is too busy, but is to cover emergency situations only. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984).

The time for filing an appeal is jurisdictional and ordinarily cannot be enlarged. State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991).

Proper remedy of defendant whose cross-appeal was not timely filed under Subdivision (d), upon having the notice returned, was to file a motion to extend time with the district court under Subdivision (e); the appellate court could not consider such a motion, or grant an extension, on appeal. Glezos v. Frontier Inv., 896 P.2d 1230 (Utah Ct. App. 1995).

—Amendment or modification of judgment.

If an amendment or modification does not change the substance or character of a judgment, it does not enlarge the time for appeal. Nielson v. Gurley, 888 P.2d 130 (Utah Ct. App. 1994).

Filing of notice.

The mailing of a notice of appeal was not equivalent to a filing of notice of appeal. Isaacson v. Dorius, 669 P.2d 849 (Utah 1983).

Filing with county clerk.

Filing with the county clerk was not a timely filing with the juvenile court, where there was no indication when the clerk transmitted a copy of the notice of appeal to the juvenile court, and the original was returned to appellant's counsel. State, In re M.S., 781 P.2d 1287 (Utah Ct. App. 1989).

Final order or judgment.

Where the trial court signed two different judgments but neither party served his prepared judgment on the other party before submitting it to the court, the filing of either judgment would be erroneous, and an appeal taken from either is premature because the judgments are not properly "final." Larsen v. Larsen, 674 P.2d 116 (Utah 1983).

Juvenile court's order for temporary confinement in a youth facility for observation and assessment prior to a final disposition was not a final order, for purposes of appeal, because it did not finally dispose of all issues, including the rights of the juvenile and/or his mother's rights as parental custodian. State, In re T.D.C., 748 P.2d 201 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988).

An unsigned minute entry is not a final judgment for purposes of appeal. A judgment, tolled by a timely post-judgment motion, starts to run on the date when the trial court enters its first signed order denying the motion. Gallardo v. Bolinder, 800 P.2d 816 (Utah 1990).

A signed minute entry ordering defendant's counsel to prepare an order showing that plaintiff's post-judgment motions filed pursuant to Rules 52(b) and 59, U.R.C.P., were denied was not a final appealable order. Swenson Assocs Architects v. State, 254 Utah Adv. Rep. 9 (Utah 1994).

Post-judgment motions.

Where a post-judgment motion was timely filed under Rule 59(a)(6), U.R.C.P., to upset the judgment, and notices of appeal from the judgment were filed after the motion was made, but before the disposition of the motion, the motion rendered the notices of appeal ineffective, and notice of appeal had to be filed within the required time from the date of the entry that disposed of the motion. U-M Invs. v. Ray, 658 P.2d 1186 (Utah 1982).

The time for appeal of an order confirming

[illegible]to prove permanence of injuries and to [illegible]instructions to jury thereon, 18 [illegible]3d 170.

[illegible]opriety and effect, in eminent domain pro-[illegible]ding, of instruction to the jury as to land-[illegible]'s unwillingness to sell property, 20 [illegible].R.3d 1081.

[illegible]rdict-urging instructions in civil case [illegible]ing desirability and importance of agree-[illegible]t, 38 A.L.R.3d 1281.

[illegible]rdict-urging instructions in civil case [illegible]menting on weight of majority view or au-[illegible]izing compromise, 41 A.L.R.3d 845.

[illegible]rdict-urging instructions in civil case ad-[illegible]nishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇐ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS